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IN THE

Supreme Court of the United States

PUBLIC SERVICE COMMISSION OF WISCONSIN, ET AL.
Petitioners,

v.

WISCONSIN BELL, INC., D/B/A AMERITECH WISCONSIN, ET AL.
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

AMICI CURIAE BRIEF OF THE STATE COMMISSIONS OF MISSOURI, UTAH, KENTUCKY, MONTANA, MAINE, NORTH CAROLINA, PENNSYLVANIA, NEVADA, KANSAS, MARYLAND, MICHIGAN, VIRGINIA, AND NEW HAMPSHIRE, AND OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS SUPPORTING PETITIONERS

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INTEREST OF THE *AMICI*

The Missouri Public Service Commission, Public Service Commission of Utah, Kentucky Public Service Commission, Montana Public Service Commission, Maine Public Utilities Commission, North Carolina Utilities Commission, Pennsylvania Public Utility Commission, Public Utilities Commission of Nevada, Kansas Corporation Commission, Maryland Public Service Commission, Michigan Public Service Commission, Virginia State Corporation Commission, New Hampshire Public Utilities Commission, and National Association of Regulatory Utility Commissioners (hereinafter "*Amici*") submit this brief in support of Petitioners Public Service Commission of Wisconsin and Cheryl L. Parrino, Daniel L. Eastman and Joseph P. Mettner, and their respective successors, in their official capacities as Commissioners of the Public Service Commission of Wisconsin. Counsel has obtained the written consent of all parties to this proceeding to file this brief on behalf of the Missouri Public Service Commission. All other *Amici* later joined in the filing of this brief.

The *Amici* Commissions are administrative agencies with broad regulatory authority over public utility companies, including regulatory jurisdiction with respect to intrastate operations of telecommunications carriers. *Amicus* National Association of Regulatory Utility Commissioners is the national organization of Commissioners of the *Amici* Commissions and other state public utility commissions. Each of the State agency *Amici* is a "State commission" under section 252 of the federal Telecommunications Act of 1966 (the "Act").[1] The instant case involves the sovereign immunity of State commissions and the immunity of the

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[1] 47 U.S.C. § 252; 47 U.S.C. § 153(41) (defining "State commission" as "the commission, board, or official (by whatever name designated) which under the laws of any State has regulatory jurisdiction with respect to intrastate operations of carriers.").

individual commissioners who serve on these State commissions. Thus, the *Amici* have a vital interest in the ultimate outcome of the instant case.

An additional interest is that State commissions across the country are allocating scarce resources to challenge federal court jurisdiction in pending section 252(e)(6) actions under the Act. Granting the petition and issuing a decision in the instant case will provide necessary direction to resolve these important jurisdictional disputes and allow the courts, State commissions and carriers to turn their attention to substantive disputes arising from interconnection agreement determinations made by State commissions.

In support of Petitioners' request for a writ of certiorari, this brief contains new arguments not heretofore advanced by the parties in this case.

SUMMARY OF THE ARGUMENT

The court below erred in two primary respects in holding that State commissions, and States, waive their sovereign immunity by continuing their traditional intrastate regulation of telecommunications carriers and services since enactment of the Telecommunications Act of 1996. First, the court failed to analyze whether the purported waiver was voluntary, as required by this Court's decision in College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999). In place of analysis, the court below substituted a one-sentence conclusion that "states voluntarily waive their sovereign immunity by accepting that invitation" to regulate the local market under section 252 of the Act. MCI Telecommunications Corp. v. Illinois Bell Telephone Co., 222 F.3d 323, 342 (7th Cir. 2000). Under College Savings Bank, the court was obliged to consider the voluntariness of the purported waiver. Mere

reference to "acceptance" of an "invitation" to regulate does not suffice under a long line of decisions of this Court. The court below also failed to consider that before it was a constitutional right, guaranteed to the States by the Eleventh Amendment, and that waivers of constitutional rights are not so readily found, without a far more detailed analysis of the surrounding circumstances.

Second, the court stretched the reach of section 252(e)(6) beyond its plain words, in contravention of the very principles the court had enunciated. Rather than abiding by the maxims that congressional intent to exact waivers of Eleventh Amendment immunity must be "unequivocal" and that the court must "'indulge every reasonable presumption against' a state's waiver of immunity," the court applied section 252(e)(6) to a broad range of everyday State commission deliberations and interpreted it to exact waivers of sovereign immunity when State commissions engage in review, enforcement and other post-approval determinations. 222 F.3d at 337. Not only was this extension of the statute error, but its breadth creates unwarranted dilemmas for State commissions and federal courts every time issues arise with respect to interconnection agreements, no matter how far distanced from any concern expressed in section 251 or section 252 of the Act. The decision below also broadly expands federal courts' roles in reviewing State administrative decisions and subjects these decisions to four years of uncertainty, all without rationale in the Act.

ARGUMENT

I. THE COURT ERRED IN FAILING TO ASSESS AND TO ASCERTAIN THE VOLUNTARINESS OF THE PURPORTED WAIVER OF SOVEREIGN IMMUNITY

In College Savings Bank, this Court acknowledged three fundamental principles governing the waiver issue. First, the waiver must be "altogether voluntary." 527 U.S. at 675, 681, quoting Beers v. Arkansas, 20 How. 527, 529, 15 L. Ed. 991 (1858). Second, "[c]onstructive consent is not a doctrine commonly associated with the surrender of constitutional rights." 527 U.S. at 681, quoting Edelman v. Jordan, 415 U.S. 651, 673 (1974).[2] Third, inducements "may be so coercive as to pass the point at which 'pressure turns into compulsion.'" 527 U.S. at 687, quoting South Carolina v. Dole, 483 U.S. 203, 211 (1987).

In the instant case, the court below failed to apply these principles. In contrast to the analysis of the Wisconsin district court decision that the court of appeals reversed, Wisconsin Bell, Inc. v. Public Service Comm'n of Wisconsin, 57 F. Supp.2d 710 (W.D. Wis. 1999), the court below simply equated what it viewed as States' acceptance of the "invitation" to regulate intrastate telecommunications

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[2] This Court went on expansively to quote other decisions, in pertinent part, as follows:

> The classic description of an effective waiver of a constitutional right is the "intentional relinquishment or abandonment of a known right or privilege." ... [W]e "do not presume acquiescence in the loss of fundamental rights" ... State sovereign immunity, no less that the right to trial by jury in criminal cases, is constitutionally protected.

527 U.S. at 682 (citations omitted).

with voluntariness. But acceptance alone is not the same as voluntary acceptance. Indeed, the mere fact of acceptance begs the question of whether the acceptance, i.e. the waiver, was voluntary. Acceptance is the starting point of the analysis, not the finish line. Acceptance or acquiescence might, just as readily, be involuntary as voluntary. Once the court finds that the possessor of the constitutional right has relinquished that right, then the court must examine the "totality of the circumstances" in order to determine whether that relinquishment was voluntary or coerced. See, e.g., Arizona v. Fulminante, 499 U.S. 279, 285-88 (1991). Waiver without detailed consideration of the context is, at best, voluntary only by happenstance.

This test required the court to assay the participation of the public service commissions of Illinois and Wisconsin in the Act's regulatory scheme from the commissions' view, and not merely look to the statute as ipso facto determinative of whether the commissions' regulation constituted a voluntary waiver of the states' constitutional right. See, e.g., United States v. Mendenhall, 446 U.S. 544, 558 (1980). The party claiming voluntary waiver, not the party claiming the constitutional right, bears the burden of proof. Id. at 557.

The court below, unlike the district court, failed to engage in this mandatory analysis, relying solely on the fact of State commission regulation. In essence, the court of appeals' conclusory logic is tautological: The States' acceptance of the "invitation" to regulate, according to the lower court's analysis, itself makes the acceptance voluntary. The court clearly reached its conclusion improperly. Had the Seventh Circuit properly analyzed the "totality of the circumstances," it well could have, and *Amici* submit should have, reached the same decision as did the district court.

What the Seventh Circuit did was reinstate fully the concept of constructive waiver of a constitutional right,

which this Court significantly narrowed, if not eliminated, in College Savings Bank. Reincarnating constructive waiver, where mere acquiescence suffices, vitiates the separate requirement of voluntariness and will allow "gun to the head" coercion to induce waiver of constitutional rights.

The court below did not limit its resuscitation of constructive waiver to eliminating consideration of voluntariness. The court was faced also with the issue of whether, and how, a State commission, wholly lacking the power or authority to waive a State's sovereign immunity, could waive that immunity by regulating intrastate telecommunications. The court gave this argument only passing, footnote consideration. 222 F.3d at 344 n. 10. In doing so, the court grafted another form of constructive waiver onto jurisprudence disfavoring constructive waiver. The court reasoned that since neither Illinois nor Wisconsin had taken any steps to forbid their respective commissions from exercising their authority over intrastate telecommunications, the States themselves, not the commissions, had waived their immunity.

The court did not suggest that the respective State legislatures' failure to act was the requisite clear, unequivocal and unambiguous expression of waiver. Any such suggestion, had it been made, clearly would have been wrong. Instead, in the place of the required clarity and certainty, the court was forced to substitute constructive waiver by default, a basis for waiver without foundation and without legal support.

II. THE COURT ERRED IN OVEREXTENDING SECTION 252 (e)(6) TO REVIEW AND ENFORCEMENT OF ORDERS, WHERE WAIVER OF SOVEREIGN IMMUNITY AND CONSTANT FEDERAL COURT INTERVENTION ARE UNWARRANTED

The Seventh Circuit cited two principles to guide its determination of whether State commissions waive sovereign immunity under section 252(e)(6). First, the court "'indulge[s] every reasonable presumption against' a state's waiver of immunity." 222 F.3d at 338, quoting College Savings Bank. Second, "[w]hen it intends to obtain a waiver of immunity from the states, Congress must 'speak with a clear voice' so that the states may exercise their choice to waive their immunity 'knowingly, cognizant of the consequence of their participation.'" 222 F.3d at 340, quoting Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 17 (1981). That is, there must be "an unequivocal expression of congressional intent" to obtain a waiver of States' constitutional immunity. Regrettably, the court failed to follow either of these principles when the court extended the reach of section 252(e)(6) well beyond its plain, unequivocal words.

The pertinent sentence of section 252(e)(6) reads as follows: "In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section." The "unequivocal expression" in this section is that federal court review is limited to a determination of whether an interconnection agreement or statement of generally available terms complies with sections 251 and 252. Presumably, this sentence may be extended to

instances after initial approval (and any judicial review) in which material terms of the agreement or the statement are altered.

However, there is nothing in section 252 indicating that Congress, or the Federal Communications Commission, believed that garden-variety administrative agency oversight and enforcement by State commissions was intended, unequivocally, to constitute a waiver of sovereign immunity. These post-approval proceedings, whether initiated on carrier complaints, citizen complaints or agency review, and whether formal or informal, are common to State commissions and may be the bread-and-butter of the administrative process. By its expansive interpretation of section 252 (e)(6), the Seventh Circuit essentially federalized these standard State commission proceedings. *Amici* submit that it simply is not correct to read section 252(e)(6) consistently with the foregoing applicable principles regarding waiver of sovereign immunity and to reach the Seventh Circuit's conclusion that this section confers jurisdiction on federal courts to review oversight, enforcement and other post-approval determinations made by State commissions. 222 F.3d at 337-38.

The result of this decision is to leave State commissions with a threshold decision each time they are asked to review, or each time public policy compels review of, an interconnection agreement, a statement of generally accepted terms or the conduct of the providers operating under either an agreement or a statement. This is a particular concern when the State commission is duty bound to regulate in the public interest or as a matter of public policy for its citizens. On each such occasion, State commissions must ask themselves if the prospect of waiver of the State's sovereign immunity and the prospect of federal court litigation are prices worth paying in exchange for the exercise of the commissions' traditional oversight of

intrastate telecommunications services and providers. This repeated threshold decision is not the type of decision-making on which Congress intended State commissions to expend their resources and efforts.

This error is compounded by the Seventh Circuit's determination to apply Ex parte Young, 209 U.S. 123 (1908), to every State commission consideration of an existing agreement or statement. To an unprecedented and unnecessary extent, and without consideration of the extraordinary breadth of its decision, the Seventh Circuit cast the shroud of personal suits in federal court on every State commissioner every time a commission considers an issue raised under or with respect to a previously approved agreement or a statement. There is no doubt that the Seventh Circuit decision will bring a grave chill to State commissions' regulation of intrastate telephone services and providers, and do so without any "clear voice," "unequivocal expression" or "unambiguously" stated condition that this is what Congress intended. 222 F.3d at 340, 341.

Nor is there anything in the Act denoting a legislative or administrative intention that federal courts were to assume the traditional administrative review role of state courts in appeals from ordinary administrative oversight of intrastate telecommunications services and providers. What the Seventh Circuit decision does is convert the federal district courts into state appellate courts in every instance where a State commission proceeding touches on an issue previously part of an interconnection agreement or statement of generally available terms. That conversion not only is unwarranted by the Act, but also adds another layer of review to every State commission decision. Instead of the normal state appellate review as the immediate first step after the administrative decision, federal court review starts in the district court and only thereafter goes to an appellate court.

The Seventh Circuit decision also brings major uncertainty to the integrity of everyday State commission review and enforcement decisions that cannot be reconciled with the Act. In ordinary State court review of decisions of State commissions, aggrieved parties have finite periods of time, generally 30-60 days, within which to take their appeals or be forever barred. But under section 252(e)(6), according to lower court decisions elsewhere, the general four-year federal statute of limitations governs. 28 U.S.C. § 1658. Thus, every decision emanating from an interconnection agreement or statement, no matter how localized, no matter how attenuated from the determination to approve or reject an agreement or statement, is subject to federal court challenge for four years. In the fast-paced world of telecommunications, leaving the federal court doors open for four years to review local decisions is not only unwarranted, but also extremely unwise.

The decision leaves State commissions with the choice to regulate or abstain in order to preserve sovereign immunity. While it may be argued, as the carriers successfully argued below, that section 252 expressly contemplates that choice with respect to determinations to approve or reject agreements or statements, the same cannot be said of the ordinary, day-to-day regulation of telephone companies. Unlike approval or rejection of an agreement or statement, there is no section 252(e)(5) fallback to the Federal Communications Commission if a State commission declines a request from a provider or a user to review conduct under a previously approved agreement or statement. Alternatively, if a court were to read into section 252(e)(5) a requirement that the FCC preempt State commission jurisdiction every time a State commission failed to act on a complaint concerning a previously approved agreement or statement, the FCC would have to perform the functions of 50 separate State commissions. That Congress intended the FCC to assume this role is not

apparent in the Act. Indeed, the primary role of the States, continuing their traditional regulation under the Act, belies this intention.

In sum, the decision below does not "'indulge every reasonable presumption against' a State's waiver of immunity." Instead, the court relied on a series of presumptions in favor of waiver, leading, therefore, to its inexorable conclusion that by engaging in any consideration of conduct under an approved agreement or statement, no matter how limited or unrelated to the prior approval, the State commissions waive State sovereign immunity and subject the individual commissioners to suit in federal court. *Amici* respectfully submit that the decision is contrary to the words and intent of the Act, contrary to judicial precedent and contrary to sound logic.

CONCLUSION

For the foregoing reasons, the Court should grant the petition of the Public Service Commission of Wisconsin and Commissioners Cheryl L. Parrino, Daniel L. Eastman and Joseph P. Mettner for a writ of certiorari.

Respectfully submitted,

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